IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

(No. 2073)

IN THE MATTER OF JAMES M. WRIGHT, DEBTOR.

JAMES M. WRIGHT, PETITIONER.

VS.

THE UNION CENTRAL LIFE INSURANCE COMPANY, RESPONDENT.

IN BANKRUPTCY UNDER SECTION 75 (s), ACT MARCH 3, 1933 AND AUGUST 28, 1935. PENDING BEFORE HONORABLE THOMAS W. SLICK, JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

NO.....

ORIGINAL.

DEBTOR'S MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION DIRECTED TO THE HONORABLE JUDGE OF SAID DISTRICT COURT AND PETITION FOR WRIT OF PROHIBITION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now James M. Wright, the Debtor in the above entitled cause, by Samuel E. Cook, his Counsel and moves the Court as follows:

1. That the Debtor asks leave to file the petition for a writ of prohibition, hereto annexed.

2. The controversy in this petition grows out of the decision of the Supreme Court (between the parties herein) in the case of James M. Wright vs. The Union Central Life Insurance Company, December 9, 1940. (85 L. Ed. Adv. Opinions 166). The value of the land herein was an issue before the District Court at the hearing on October 21, 1938. The Court heard the evidence and made a special finding of the facts and stated conclusions of law thereon. It found that the land was of the value of $6000.00. That afterwards on February 11, 1939, said District Court rendered judgment on said finding. It refused to allow the Debtor the right to redeem the land at said fixed value of $6000.00 but ordered the land sold at public auction and gave the Respondent the right to bid the whole amount of its debt of nearly $16000.00 at said sale. That entirely defeated redemption. The Debtor appealed to the Circuit Court of Appeals for the Seventh Circuit. He did not assign any error on the value of the land. The Respondent did not assign any cross-errors and thus did not question the finding of the Court as to the value of the land. On the application of the Debtor the Supreme Court granted certiorari "because of the importance of the problem to the orderly administration of the Act. (Section 75 of the Bankruptcy Act of March 3, 1933, and amended subsection (n) and subsection (s) of August 28, 1935).

The Debtor did not question the finding as to the value of the land. Neither did Respondent.

The Supreme Court handed down its decision on December 8, 1940. It reversed the decision of the District Court and Court of Appeals and held that the lower Courts erred in not allowing the Debtor to redeem at said value as fixed by the trial Court. The Court said:

"We hold that the debtor's cross petition should have been granted; that he was entitled to have the property reappraised or the value fixed at a hearing; that the value having been determined at a hearing in conformity with his request, he was then entitled to have a reasonable time, fixed by the Court, in which to **redeem at that value**; and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted." (Opinion p. 6) (Italics our own). After the case came back to the District Court the Respondent petitioned it to try the question of the value of the land again—a second time.

The Debtor objected and contended in substance that the question was tried once and was settled and contended that the Respondent had made no objection to it at the time. That it did not appeal from said finding and judgment to the Court of Appeals. That it did not question it in the Supreme Court and hence was bound by the $6000.00. That the question had been adjudicated, that the Respondent had its day in Court and that the Supreme Court had adopted the sum of $6000.00 as the basis of its opinion and hence that had become the "law of the case" and it was conclusively bound thereby. That

the Respondent could not remain silent for over two years after the finding of the District Court fixing the value at $6000.00, and then ask for another trial on that question. On June 6, 1941, the District Court ordered a reappraisement and set the hearing for June 18, 1941.

The Debtor contends the District Court is bound by the decision of the Supreme Court when it said—"that the value having been determined at a hearing in conformity with his (the Debtors) request, he (the Debtor) was then entitled to have a reasonable time fixed by the Court, in which to redeem at that value" ($6000.00). The Debtor is bound by that and must pay the $6000.00 to redeem. If he is bound, the Respondent is by the same token also bound, and must accept the $6000.00. The Debtor cannot ask to pay a cent less and the Respondent cannot demand a cent more. It follows that the action of the District Court in granting the Respondent's petition to try that question again and setting it down for trial is not in line with the decision of this Court and was "assuming an unwarranted jurisdiction" and "proceeding in excess of its lawful jurisdiction" or authority. Hence, this Court has the right to intervene. We will only cite Vol. 7, section 3648 Cyclopedia Federal Procedure and cases cited under note 3, p. 637. Other cases will be cited in the brief.

3. And asks that a rule be entered herein and issued, directing the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, and Honorable Thomas W. Slick, Judge of said Court to show cause why a writ of prohibition should not issue against him in accord-

ance with the prayer of said petition hereto annexed and why said petitioner should not have such further relief in the premises as may be just and that said Court proceed no further in said cause until the decision of the issue as to prohibition. Or in the alternative if deemed proper that a writ of mandamus be issued commanding said Judge of said District Court to proceed with the Administration of said proceedings in bankruptcy and to allow said Creditor to redeem the land therein at its value of $6000.00 as fixed by said District Court and confirmed by said Supreme Court in Wright vs. Union Central Life Insurance Company, (the parties herein) December 9, 1940 (85 L. Ed. Adv. Ops. 166). And requests notice be given as required.

Dated June ....., 1941.

Respectfully submitted,

SAMUEL E. COOK,
Huntington, Indiana,
Counsel for Petitioner.

STATE OF INDIANA)
COUNTY OF JAY) SS:

James M. Wright being duly sworn on his oath says, that he is the petitioner in the above cause and that the facts set out in the above petition are true, as he is informed and believes.

JAMES M. WRIGHT,
Petitioner.

Subscribed and sworn to before me this day of June, 1941.

SAMUEL E. COOK,
Notary Public.

My Commission Expires 3-30-43.
(SEAL)

II

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

IN THE MATTER OF JAMES M. WRIGHT, Debtor vs. THE UNION CENTRAL LIFE INSURANCE COMPANY, PETITION FOR A WRIT OF PROHIBITION AGAINST HONORABLE THOMAS W. SLICK, UNITED STATES DISTRICT JUDGE OF THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION.	NO..... IN BANKRUPTCY UNDER SECTION 75 (s) ORIGINAL PETITION FOR WRIT OF PROHIBITION, ETC.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of James M. Wright, Debtor and petitioner vs. the Honorable Thomas W. Slick, Judge of the United States District Court for the Northern District of Indiana, Fort Wayne Division, sitting in bankruptcy in said District respectfully represents to this Court the following:

1. That there is now pending in said District Court the petition and schedules of said Debtor and proceedings in bankruptcy under Section 75 of the Act of Congress of March 3, 1933, for Agricultural Compositors and extensions and its amendment by adding a new subsection (s) enacted August 28, 1935 (11 U.S.C.A. 203, 75 (s)).

2. That in said petition and schedules there was included as assets a tract of land of 200 acres situated in Jay County, Indiana, on which said In-

surance Company holds a first mortgage and that it is still in said proceedings and being administered in said District Court, as provided in said Acts of Congress.

3. That said proceedings were pending in said District Court for some time prior to December 9, 1940. That prior to said date said Creditor had filed a petition to dismiss said proceedings as to said land and to end the stay and have it ordered sold at public auction. That said Debtor filed an answer and Cross-petition to said petition. That in said Cross-petition said Debtor requested said Court to hear evidence and to fix the value of said real estate as provided in paragraph (3) of said subsection (s) and to enter an order allowing him to redeem said land at said value and, when so paid, that the Court enter an order in said proceedings turning over said land to him free and clear of said mortgage debt and to discharge him on account of any deficiency judgment. That said Debtor also alleged that the only way he could redeem said land was by allowing him to pay said appraised value as provided in said Acts and that said debt was double the value of said land and hence he could not be refinanced and rehabilitated on the basis of said whole debt.

4. That said Respondent took issue with said Cross-petition and filed an answer in which it denied the right of the Debtor to redeem said land or to have it turned over to him free and clear of incumbrances upon payment of the value fixed by an appraisement and be discharged of liability on account of any deficiency judgment:

That the Respondent requested the Court in

writing to direct an immediate sale of said real estate and contended that said written request took precedence over the right given the Debtor to purchase (redeem) said land and that it should not be turned over to him at the appraised value thereof free and clear of incumbrances and that said Debtor is not entitled to any further relief under Section 75 (s) of said Acts.

5. That said cause and said issues as to said value and the right to redeem came on for hearing before said Court on October 21, 1938. That said Court heard the evidence as to the value of said real estate. That on January 30, 1939, said Court made and filed its special finding of facts and stated its conclusions of law thereon. Among other things said Court found that the value of said land was $6000.00 and the amount of the mortgage debt was $15903.68 and it stated its conclusions of law that the law was with the Creditor or petitioner and said Court refused to allow said Debtor to redeem said real estate at said value of $6000.00 but ordered said land sold at public auction. That said $6000.00 is all said land is worth and all he could afford to pay therefor. That said Respondent took no exceptions to said finding that said land was worth $6000.00 and made no objection to said finding as to said value.

6. That on February 11, 1939, said Court rendered judgment on said findings and conclusions of law, in effect that it refused to allow said Debtor to redeem said land at said $6000.00 but ordered said real estate sold at public auction and allowed said Creditor to bid its whole debt at said sale which was then approximately $16000.00.

7. That afterwards said Debtor appealed from said judgment of said District Court to the Circuit Court of Appeals for the Seventh Circuit. That in his assignment of errors in said appeal the Debtor did not assign as error the action of the District Court in fixing said value, but the Debtor did assign as error the action of said Court in denying him the right to redeem said land at its appraised value of $6000.00.

And also assigned that said Court erred in forfeiting said land and ending the stay and in ordering it sold at public auction and thereby depriving him of the benefits of said Act. (Requiring him to pay $16000.00 for $6000.00 worth of land). That said Respondent did not assign any cross-error on the action of the Court in fixing said value at said sum ($6000.00) or made any objection thereto in any way.

8. That afterwards said Debtor filed his petition in said Supreme Court for certiorari which was granted. That said Debtor did not in said petition assign any error as to the action of said Court in fixing the value of the land at $6000.00 nor question the same in any way. But said Debtor did assign as error the action of said Court of Appeals in affirming the decision of said District Court refusing to allow the Debtor to redeem said land at said $6000.00 as fixed by said Court.

9. That on December 9, 1940, said Supreme Court handed down its decision and opinion in said appeal, reversing the judgment of said District Court and said Court of Appeals and holding among other things that the action of said Courts in deny-

ing said Debtor an opportunity to redeem said land "at the value fixed by the Court, before ordering a public sale was reversible error" and then the Court in the said opinion said:

"We hold that the debtor's cross-petition should have been granted; that he was entitled to have the property reappraised or the value fixed at a hearing; that the value having been determined at a hearing in conformity with his request, he was then entitled to have a reasonable time, fixed by the Court, in which to **redeem at that value**; and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted." (Italics our own) Opinion p. 6.

10. Then the Court added: "To the extent indicated, we modify the judgment and we remand the cause to the District Court for further proceedings."

11. That means that the District Court should carry out the judgment by allowing the Debtor to redeem the land at the fixed value of $6000.00. It means that was all he would have to pay to redeem. The Supreme Court thus confirmed and adopted the $6000.00 as the basis for redemption in the future.

12. Mark the language of the Court. "He was then entitled to have a reasonable time fixed by the Court, in which to redeem **at that value** (Italics our own) ($6000.00). And then to clinch the matter the Court said: "And if he did so redeem (pay the $6000.00) the land should be turned over to him free and clear of incumbrances and his discharge granted." Opinion p. 6. A brief will be filed later.

13. That the action of said District Judge in not

allowing said Debtor to redeem at said $6000.00 and in granting said petition to reappraise said real estate was "assuming an unwarranted jurisdiction" over said question and was proceeding in excess of his lawful authority which calls for the exercise of this Court's power of supervision over the actions of the Inferior Federal Court. Vol. 7, section 3648 Cyc. Fed. Proc.

14. That said Court has set said matter of said proposed re-appraisement for trial for June 18, 1941, and the petitioner believes that unless restrained by this Court, he will proceed to hear the same. That there is an emergency to maintain the status in quo until said motion for leave to file this petition can be heard and also until the above petition can be heard on the merits by this Court and that said Judge of said Court should be restrained from proceeding with the trial of said question until said motion and this petition can be heard and determined.

15. In conclusion: This controversy arises in the execution of the judgment of this Court by the District Court. The parties are the same. The Supreme Court expressly held that the Debtor had the right to redeem his home at the $6000.00, the value fixed by said District Court. It required him to pay that sum and he is bound by it and must pay it. The Respondent is also bound by it and must accept it and cannot demand a cent more. The District Court is bound by the decision too. It has no power to change the amount. All of the power it has is to fix the time in which the Debtor shall redeem. In not carrying out the decision, and ordering a re-appraisement

and a hearing thereon it is "assuming an unwarranted jurisdiction" and is "proceeding in excess of its lawful jurisdiction." Vol. 7, section 3648 Cyc. Fed. Proc. and cases cited under note 3, p. 637. It is crossing the "dead line." The Debtor has no other direct adequate remedy to stop the Court from crossing the line, except by the aid of the Supreme Court by writ of prohibition or mandate, in the exercise of its great power of supervision over the decisions of the Inferior Federal Courts.

This is certainly a case where this extraordinary remedy should be applied. It is the only practical remedy.

16. Wherefore, your petitioner prays that a writ of prohibition may issue against the said Honorable Thomas W. Slick, Judge of the United States District for the Northern District of Indiana, prohibiting him from proceeding with said cause or in the alternative, if the Court deems it proper to issue a mandate directing said Judge to proceed in said cause in conformity with the Supreme Court in said Wright case and that he be restrained from taking any further action in the matter above set out until the motion for leave can be heard, and until this petition can be heard and determined on the merits and for all the other relief he may be entitled to in the premises.

Respectfully submitted,

SAMUEL E. COOK,
Counsel for Petitioner.

STATE OF INDIANA
COUNTY OF JAY } SS:

James M. Wright being duly sworn on his oath says:

That he is the petitioner herein and that he has read said petition and that the material allegations set therein are true in substance and in fact as he is informed and verily believes.

JAMES M. WRIGHT,
Petitioner.

Subscribed and sworn to before me this ..... day of June, 1941.

SAMUEL E. COOK,
Notary Public.

My Commission Expires 3-30-43.
(SEAL)

Certificate

State of Indiana
County of Huntington } SS:

Samuel E. Cook, Counsel for the above named petitioner, James M. Wright, does hereby certify that in his opinion the above and foregoing petition for a writ of prohibition of said cause is well founded and is presented in good faith and not for delay.

SAMUEL E. COOK,
Counsel for Petitioner.

In forma pauperis
Petition not printed

OCT 2 1941
CHARLES ELMORE CROPLEY
CLERK

314 620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 620

IN THE MATTER OF JAMES M. WRIGHT, DEBTOR.

JAMES M. WRIGHT,

Petitioner,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT, THE UNION CENTRAL LIFE INSURANCE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ARTHUR S. LYTTON,
OLAF A. OLSON,
Chicago, Illinois,
VIRGIL D. PARISH,
Cincinnati, Ohio,
Attorneys for Respondent.

ROSCOE D. WHEAT,
Portland, Indiana,
Of Counsel.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Statement	1
Summary of Argument	6
I. Res Judicata	6
II. No Conflict in Decisions	6
III. Petition Based on False Premise	7
IV. Appeal From District Court Was Too Late	7
Argument	9
I. Res Judicata	9
II. No Conflict in Decisions	9
III. Petition Based on False Premise	13
IV. Appeal From District Court Was Too Late	16
Conclusion	18

CASES CITED.

Borchard v. California Bank & Trust Co., 310 U. S. 311, 84 L. Ed. 867 6

Everett v. Johnson, 228 U. S. 474, 57 L. Ed. 927 15

John Hancock, etc. Co. v. Bartels, 308 U. S. 180, 84 L. Ed. 154 6

Kalb v. Feuerstein, 308 U. S. 433, 84 L. Ed. 281 6

Local Loan Co. v. Hunt, 292 U. S. 234, 78 L. Ed. 1230 .. 15

Louisville Bank v. Radford, 295 U. S. 555 12

Marden v. Campbell Printing Press etc. Co., 61 Fed. 607 (C. C. A. 1st) 18

Marden v. Campbell Printing Press, etc. Co., 67 Fed. 809 (C. C. A. 1st) 8

Soberanes De Cambuston v. U. S., 95 U. S. 285, 24 L. Ed. 448 ..... 8, 18

Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577 ... 15

Union Joint Stock Land Bank, etc. v. Byerly, 310 U. S. 1, 84 L. Ed. 1041 12

Wayne United Gas Co. v. Owens-Ills. Glass Co., 300 U. S. 131, 81 L. Ed. 557 ..... 8, 17

James M. Wright v. Union Central Life Insurance Company, 304 U. S. 502, 58 S. Ct. 1025, 82 L. Ed. 1490 ..... 2, 6, 7, 9, 10

Wright v. Union Central Life Ins. Co. (decided Dec. 9, 1940) ..... U. S. ....., 85 L. Ed. Adv. Ops. 166 7

STATUTES CITED.

Ind. Ann. Stat. (Burns, 1933) Sec. 2-3909, 2-4001 15

U. S. C. A. Title 28, Section 230 ..... 5, 7, 17

U. S. C. A. Title 28, Sec. 391 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 620

IN THE MATTER OF JAMES M. WRIGHT, DEBTOR.

JAMES M. WRIGHT,

Petitioner,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT, THE UNION CENTRAL LIFE INSURANCE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT.

Neither the Petition for Certiorari nor the brief in support thereof contains any statement of facts or previous procedural steps, nor does either identify the property involved or the particular judgment sought to be reviewed. Most important, Petitioner does not disclose that more

than three years ago this Honorable Court specifically excluded this property from bankruptcy and adjudicated the very issues and the principles upon which Petitioner's contentions herein appear to be based. Hence, it is deemed essential to present a statement of the purview of said previous decision and of the facts pertinent to a consideration of said Petition.

The only property involved herein is the 80.31 acre tract of Indiana farm land which was definitely and finally disposed of by this Honorable Court in its opinion of May 31, 1938. (*James M. Wright* v. *Union Central Life Insurance Company*, 304 U. S. 502, 58 S. Ct. 1025, 82 L. Ed. 1490.) It was there held that the Bankruptcy Court never acquired jurisdiction of said tract and the latter was not subject to administration therein and the judgments of the lower courts were affirmed.

In his opinion, Mr. Justice Reed detailed the facts and pointed out that at the time of filing his original petition (October 29, 1934) under Section 75 of the Bankruptcy Act, Petitioner was not the owner of the 80.31 acre tract, having deeded the same to his son several years before. Hence, that the unauthorized inclusion of this land in Petitioner's bankruptcy schedules could not and did not vest jurisdiction thereof in the Bankruptcy Court.

The opinion also recited that prior to the filing of said Petition under Section 75, Respondent brought suit to foreclose a mortgage it held upon said land, the same resulting in a foreclosure judgment and a sheriff's sale thereunder on July 12, 1934. On April 13, 1935 said tract was reconveyed to Petitioner, but this Court held that the established rule in general bankruptcy applied equally in cases under Section 75 and that property or property rights acquired by a debtor after the filing of his petition were not thereby brought within the jurisdiction of the Bankruptcy Court.

Any contention that this 80.31 acre tract came into the purview of the Bankruptcy Court by reason of the Amendment of August 28, 1935 or the amended petition filed thereunder October 11, 1935 is also completely refuted by said opinion. It is recited that the period of redemption from the foreclosure sale expired on July 12, 1935 and Respondent received the sheriff's deed on August 2, 1935. The Court held that there is nothing in Section 75, "as it now stands" that "indicates any intention that the bankruptcy courts assume control over land not previously within the jurisdiction of a bankruptcy court and already completely divorced from any title of the debtor."

The above decision was occasioned by a review in this Court of judgments of the United States Circuit Court of Appeals (7th Circuit) affirming orders of the District Court (Northern District of Indiana) whereby said 80.31 acre tract was stricken from debtor's (Petitioner's) schedules in bankruptcy proceedings under Section 75(s) and his application to reinstate the land in said schedules was denied. As to this tract the judgments of the District Court and Court of Appeals were affirmed. As to other lands covered by said opinion and *not involved in the present case*, reversals were ordered. This Statement relates only to the 80.31 acre tract.

After the opinion of this Court dated May 31, 1938, Petitioner made no attempt to revive his contentions with respect to this tract until August 15, 1940, more than two years later and after it had been sold to a third party, as admitted in the petition next mentioned. On the last named date Petitioner filed in the District Court a petition asking that the sheriff's sale of July 12, 1934 be set aside and that said tract be restored to his bankruptcy schedules. Respondent promptly filed a written motion to strike and dismiss said petition as insufficient for reasons specified—largely the same as those advanced herein.

In said petition it was not stated or inferred that there was or had been any change in the facts or procedure or any facts newly discovered since the rendition of Mr. Justice Reed's opinion of May 31, 1938. Petitioner's theory appeared to be (as he contends here) that, without specifically designating or inferentially referring to said opinion, the more recent decisions of this Court have effected a reversal of same.

October 24, 1940 the District Court entered an order sustaining Respondent's motion and said petition was thereby stricken and dismissed. A petition for rehearing was filed December 26, 1940 and denied on February 17, 1941. On March 14, 1941, Petitioner filed in the United States Circuit Court of Appeals (7th Circuit) a petition for appeal from *said order of October 24, 1940*, which appeal was allowed on the date filed. In the Assignment of Errors filed therewith, Petitioner alleged error only in the order of October 24, 1940.

Thereafter, upon Petitioner's request, supported by his affidavit that he could not procure an attorney, the Circuit Court of Appeals appointed counsel to represent him in said appeal, designating Mr. Raymond Wallenstein, an able and reputable lawyer. Mr. Wallenstein accepted the assignment, carried it through with careful study and reported his conclusions to the Court in the form of a Request for Instructions. The latter will appear in the record herein and expresses counsel's considered opinion that the appeal sought a reversal by the Court of Appeals of the previous decision of this Court on the same land and issues.

Respondent filed a written motion to dismiss the appeal and to affirm the order entered by the District Court on October 24, 1940 for the reasons, briefly, that by its decision of May 31, 1938, this Court had conclusively disposed of the identical issues concerning the identical tract involved in said appeal and that the latter was not prayed for within

due time under the statute (U. S. C. A. Title 28, Section 230).

On May 8, 1941, without formal opinion, said Circuit Court of Appeals affirmed the orders entered by the District Court on October 24, 1940. Certiorari is sought herein to review said judgment.

We are forced to ask the indulgence of the Court with respect to the absence of record page references in this brief. The record was not printed in the Circuit Court of Appeals and has not been printed here. Largely due to the shortness of time the original transcript has not been available to us. However, we believe that all our statements of fact and of proceedings had will be found to be supported by the record. With the material at land we have earnestly endeavored to attain this end.

SUMMARY OF ARGUMENT.

I.

Res Judicata.

The basic issues presented by the Petition for Certiorari herein were definitely and conclusively adjudicated by this Court in a case between the same parties and involving the same 80.31 acre tract.

James M. Wright v. *Union Central Life Insurance Company*, 304 U. S. 502, 58 S. Ct. 1925, 82 L. Ed. 1490.

A clear instance of *res judicata*.

II.

No Conflict in Decisions.

The petition wholly fails to disclose *any* basis for the granting of a writ of certiorari. There are vague and general assertions of conflict between the decision of the Circuit Court of Appeals on a federal question and applicable decisions of this Court, but the alleged conflict is not specified nor is the nature or degree thereof pointed out. Indeed, the decision of the lower court followed and was based upon the decision of this Court in *Wright* v. *Union Central Life Insurance Company, supra.* There is no occasion for the exercise of this Court's discretionary power under Supreme Court Rule 38, Paragraph 5(b).

The judgment of the Circuit Court of Appeals was not in conflict with either *John Hancock, etc. Co.* v. *Bartels*, 308 U. S. 180, 84 L. Ed. 154; *Kalb* v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 281; *Borchard* v. *California Bank & Trust Co.*, 310 U. S. 311, 84 L. Ed. 867; *Wright* v. *Union Central*

Life Ins. Co., (decided Dec. 9, 1940) ____ U. S. ____, 85 L. Ed. Adv. Ops. 166, or any other decision of this Court. Not one of these cases cited by Petitioner, is applicable to the instant case and not one of them reverses or modifies in any degree, by expression or implication, the holding of this Court in the first case of *Wright* v. *Union Central Life Insurance Co.*, 304 U. S. 502, 82 L. Ed. 1490.

III.

Petition Based on False Premise.

The petition rests wholly upon the *false premise*,

(a) That Petitioner was owner of the 80.31 acre tract at the time his original petition was filed, October 29, 1934 and that thereby jurisdiction of said land was acquired by the Bankruptcy Court, and

(b) That by the terms of Section 75(s) as amended August 28, 1935, the filing of an amended petition thereunder continued in effect the jurisdiction of the Bankruptcy Court over this tract.

That the foregoing is a false premise is demonstrated by,

(a) The adjudication of this Court in *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502.

(b) The provisions of Section 75(s), plus the facts set out in the above Statement.

IV.

Appeal From District Court Was Too Late.

Petitioner's application for appeal from the District Court's order of October 24, 1940 was not filed in the Circuit Court of Appeals until March 14, 1941. This was almost two months beyond the time limited by statute for such appeal. (U. S. C. A., Title 28, Section 230.) The time for appeal was not extended by reason of the petition for

rehearing filed by Petitioner in the District Court on December 26, 1940—long past the ten day period limited by the Rules of Civil Procedure (Rule 59(b)).

Wayne United Gas Co. v. *Owens-Ills. Glass Co.*, 300 U. S. 131, 81 L. Ed. 557.

Soberanes De Cambuston v. *U. S.*, 95 U. S. 285, 24 L. Ed. 448.

Marden v. *Campbell Printing Press, etc. Co.*, 67 Fed. 809 (C. C. A. 1st).

ARGUMENT.

I.

Res Judicata.

We hardly believe it necessary to elaborate further on Point 1 of the above summary, viz., that the basic issues and contentions presented by the Petition for Certiorari are the same as those disposed by this Court, concerning the identical tract of land and between the identical parties, in *James M. Wright* v. *Union Central Life Insurance Company*, 304 U. S. 502, 58 S. Ct. 1025, 82 L. Ed. 1490.

The opinion in said case speaks for itself. Petitioner has failed to indicate any change in the situation which might warrant an abandonment of that opinion or of the principles there announced. This farm long since has been sold by Respondent and all parties (including Petitioner) have relied upon said decision. The petition falls far short of revealing any possible reason to support the relief it prays.

This case plainly is one requiring the application of the principle of *res judicata*. The same issues concerning the same subject-matter and between the same parties already have been adjudicated by this Court.

II.

No Conflict in Decisions.

Rule 38 of this Court, concerning review on certiorari, is clear and definite. We sincerely and respectfully urge that the Petition herein utterly fails to demonstrate a single reason of the character required by said Rule for consideration.

Page 5 of the Petition contains the only "reason" asserted, viz., that the decision of the Court of Appeals is in conflict with "applicable decisions of the Supreme Court." That general statement is not amplified there or elsewhere in the Petition (or brief in support thereof) by any specification pointing out the so-called "conflict" nor the extent or nature thereof. Vague generalties are not within the purview of clause 5(b) of Rule 38, which is cited on said page 5 of the Petition.

Without identification thereof, Petitioner, nevertheless, argues at length that the Court of Appeals order presented a "conflict." We would not be warranted in ignoring same and in failing to make answer thereto.

It is manifest that in its order of October 24, 1940 the District Court followed the dictates of this Court as expressed in the Wright opinion of May 31, 1938 and that the Circuit Court of Appeals did likewise in its affirmance. Said opinion then stood and still stands without reversal or modification.

Petitioner asserts that the Circuit Court of Appeals failed or refused to give effect to Section 75(s) and that therefore its decision was in conflict with *John Hancock, etc. Co.* v. *Bartels, supra, Kalb* v. *Feuerstein, supra, Borchard* v. *California Bank & Trust Co., supra,* and *Wright* v. *Union Central Life Ins. Co.* (decided Dec. 9, 1940), *supra.* If, as must be clear, the orders of the lower courts were consistent with this Court's decision in *James M. Wright* v. *Union Central Life Ins. Co.,* 304 U. S. 502, it *must* be the further contention of Petitioner that the latter decision was overruled by the Bartels, Kalb, Borchard or second Wright opinions—or by all of them.

Petitioner does not *express* this contention but that could not be expected—in view of *his careful avoidance of any mention of the first Wright opinion.* Nevertheless, we cannot escape the necessary *inference* and will answer it to-

gether with the assertions *expressed* in the petition. An answer to the one should suffice as an answer to the others.

It should first be noted that no reversal or modification of the Wright decision (304 U. S. 502) is expressed or intimated in either of the more recent opinions cited by Petitioner and listed above. There is no indication that this Court intended them to constitute a departure in *any* degree, from that in said Wright case. Due to manifest differences in *facts,* neither the Bartels, Kalb or Borchard decisions is "applicable" to the holdings of the Circuit Court of Appeals—or of this Court as to the 80.31 acre tract.

In the Bartels case, *supra,* the Bankruptcy Court *duly acquired jurisdiction* of the debtor and his property by virtue of a petition under amended Section 75(s) praying to be adjudicated a bankrupt and for other relief as provided by the statute. The adjudication was had but was later set aside, further relief was refused and the whole proceeding dismissed. This Court affirmed a reversal of the District Court's action, stating that it was concerned only with the duty of the District Court to follow the procedure defined by the statute. The initial *jurisdiction* of the Bankruptcy Court was not questioned.

In *Kalb* v. *Feuerstein, supra,* the debtor filed a petition for relief under amended Section 75(s) before he had been wholly divested of title to his land. Nevertheless, the foreclosure proceeding in the State Court was completed and orders were entered therein *after* said petition was filed. Under previous decisions of this Court it is clear that the Bankruptcy Court acquired exclusive jurisdiction of debtor's land upon the filing of his petition and the State Court proceedings thereafter were of no effect.

Borchard v. *California Bank, supra,* was a case in which jurisdiction of the Bankruptcy Court over debtor's land was first invoked by petition filed under original sub-sec-

tion (s). After the latter was held invalid (*Louisville Bank* v. *Radford*, 295 U. S. 555) this petition was dismissed and subsequently debtor petitioned for reinstatement pursuant to the provisions of Section 75(s), as amended. The jurisdiction thereby regained by the Bankruptcy Court was conceded. After many months, during which it failed to follow the procedure required by the statute, that Court released the land from its jurisdiction. The order was reversed by this Court and the case remanded for administration in the District Court pursuant to the statute.

In the Bartels and Kalb cases the jurisdiction originated under Section 75(s), as amended August 28, 1935, by virtue of petitions filed thereunder *before debtors had been completely divested of title to the lands or substantial rights therein.* In the Borchard case jurisdiction originated by proceedings under the first Frazier-Lemke Amendment while debtor owned the land and was regained pursuant to clause 5 of amended sub-section(s). Jurisdiction was never controverted.

On pages 17, 18 and 21 of his brief Petitioner refers to the decision of this Court in *Wright* v. *Union Central*, rendered December 9, 1940, and insists that the judgment complained of herein is in conflict therewith. He fails or refuses to recognize that in its previous decision (which he ignores) concerning the 80.31 acre tract involved herein this Court found and held that the facts and the law applicable thereto differed radically from those relating to the 200 acres covered by the opinion of December 9, 1940. Any effort by us to elaborate on the distinction made by this Court would be superfluous.

While it is not mentioned in the brief, the Petition (pp. 8, 9) refers to the minority opinion in *Union Joint Stock Land Bank, etc.* v. *Byerly*, 310 U. S. 1, 84 L. Ed. 1041, suggesting that same be applied to the instant facts and made the majority opinion herein. Discussion of the two

opinions in the Byerly case is uncalled for and would be out of order here. The majority opinion cites with approval the previous decision as to this tract and the principles urged in the minority opinion would have no application to a case where (as here) the Bankruptcy Court never had acquired jurisdiction of the land under original Section 75(s). The earlier Wright decision is not criticized or even mentioned in the latter opinion.

It is difficult to understand the contention that either of these decisions could have any application to the instant case wherein the debtor had no right, title or interest to or in the 80.31 acre tract when he scheduled it with his petition under original Section 75 and 75(s) and the only right (being a right to redeem) *thereafter* acquired by him (and not subject to the pending bankruptcy proceeding) had been irrevocably lost by the expiration of the redemption period and the delivery of deed *prior* to the Amendment of August 28, 1935 and the filing of his petition thereunder. It is even more difficult to understand the *inferred* contention that said decisions were intended to and did reverse or modify this Court's opinion of May 31, 1938.

III.

Petition Based on False Premise.

In the opening paragraph of the Petition for Certiorari herein (entitled "1. Summary statement of matters involved."), Petitioner states his basic contention,

> "that *his* real estate was in bankruptcy by virtue of his petition and schedules under amended sub-section (n) of the Act of August 28, 1935." (Italics ours.)

From the assertions on page 2 of the Petition, point 3 on page 16 of the brief in support and the first three points in Summary of Argument in said brief (pages 19, 20), we gather that Petitioner means to couple the statement above

quoted with an inferred (but not expressed) contention that jurisdiction of the Bankruptcy Court originated with his first petition under Section 75 and that sub-section (n) of the new Act restored same. The Petition and brief are not easy to follow but this is our interpretation of same.

Point 3 of our Summary refers to the above. The entire Petition and the brief in support thereof are founded on the false premise of *property ownership by Petitioner* and consequent jurisdiction in bankruptcy. If, either at the time Petitioner filed his original petition under Section 75, his amended petition under the first sub-section (s), or his petition under the Act of August 28, 1935, he had owned the 80.31 tract or any substantial property right therein (such as an equity of redemption), the jurisdiction of bankruptcy with regard thereto would have been established. That question has been determined repeatedly by the decisions of this Court. But such was *not* the case and Petitioner's false premise cannot stand.

First. In the Wright decision of May 31, 1938 (304 U. S. 502) this Court specifically found and held that Petitioner did not own this land or any right therein when his petitions under Section 75 and original (s) were filed and that not until long thereafter (April 13, 1935) was the equity of redemption conveyed to him. That right of redemption expired July 12, 1935 and on August 2, 1935 the final deed under the foreclosure action issued to Respondent. This Court held that thereby said land became "completely divorced from any title of the debtor" and was not "brought within the purview of the bankruptcy court by the Act of August 28, 1935, amending Section 75 (s) or the filing of an amended petition under this section on October 11, 1935."

Second. We shall not reiterate the facts relating to this tract as same already have been set out fully herein. However, to further establish the fallacy of Petitioner's assumptions, we venture to refer to the exact provisions of

the statute. Sub-section (n) of Section 75 (as it stood when the original petition was filed thereunder), read:

> "The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

In general bankruptcy only property owned by the bankrupt at the time of filing his petition in bankruptcy is thereby submitted to the jurisdiction of that Court. Property acquired by him thereafter is excluded.

> *Thompson* v. *Fairbanks,* 196 U. S. 516, 49 L. Ed. 577.
>
> *Everett* v. *Johnson,* 228 U. S. 474, 57 L. Ed. 927.
>
> *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 78 L. Ed. 1230.

The original sub-section (n) is quoted above to show that no change in this general bankruptcy rule was effected as to cases instituted under original Section 75(s). This was also recognized in the first Wright opinion which further observed (by foot-note) that in considering the 80.31 acre tract the Court was not concerned with any terms of Section 75(n) as amended August 28, 1935, regarding after acquired property.

When the amended petition under amended Section 75(s) was filed, the period for redemption allowed Petitioner by the Indiana statute had expired as to the land here involved. Ind. Ann. Stat. (Burns, 1933). Sec. 2-3909, 2-4001. Also, final deed had been delivered to Respondent by the

sheriff. Amended sub-section (n) designates the property brought within the jurisdiction of the Bankruptcy Court by a petition under the amended Act and excludes property not owned by the debtor. It further provides:

> "In all cases where, at the time of filing the petition, the period of redemption *has not* or *had not* expired * * * or where deed *had not been delivered*, the period of redemption shall be extended * * * for the period necessary for the purpose of carrying out the provisions of this section." (Italics ours.)

Hence, by the express provisions of the statute, both before and after the Amendment of August 28, 1935 this tract was excluded from the jurisdiction of the Bankruptcy Court. Petitioner's basic premise fails and the lower court orders stand not only upon the doctrine of *res judicata*, but upon the terms of the statute alone.

IV.

Appeal From District Court Was Too Late.

On *October 24, 1940*, the District Court entered the order from which Petitioner appealed to the Circuit Court of Appeals. Review of the affirmance by the latter is sought here. The petition for said appeal (dated March 12, 1941) was not filed in the Court of Appeals until March 14, 1941, and referred only to the order of October 24, 1940. The Assignment of Errors submitted with said petition covered this order alone. The appeal was granted, "but without prejudice to Appellees' right to move to dismiss said appeal when the entire record is before this Court." (See C. C. A. order of March 14, 1941, in original record filed in this Court).

When the entire record reached the Court of Appeals Respondent filed therein its motion to dismiss said appeal and to affirm the order of October 24, 1940, in the Court below on the ground, among others, that said appeal was

not prayed until after the expiration of the three months period allowed by the statute, Section 230, U. S. C. A. Title 28, which provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

The order of the Circuit Court of Appeals, May 8, 1941, involved herein did not dismiss the appeal but did affirm the order of October 24, 1941. As indicated by its order the Circuit Court of Appeals heard arguments on the merits of the appeal as well as on the point here urged.

Citation of authority in support of said statutory limitation is hardly necessary as it has long been sustained by this Court. However, we might mention that it was likewise recognized in a recent decision cited by Petitioner on another point, *Wayne United Gas Co.* v. *Owens-Ills. Glass Co.*, 300 U. S. 131, 81 L. Ed. 557.

Of course, that decision, as well as many others of this Court, also recognizes that the time limitation *may* be suspended by an intervening motion for a rehearing or new trial, *provided* (among other requisites) it is filed in due season. If there was no suspension of time in this instance it is manifest that the application for appeal was not made within the three month period required by the statute.

The record herein will show that on December 26, 1940, Petitioner filed a petition for a rehearing as to the order of October 24, 1940. However, this petition could effect no suspension of the period allowed for appeal as *it was filed too late* and there is no showing of proper and timely service thereof.

The Rules of Civil Procedure prescribed by this Court for the District Courts are now applicable to proceedings in bankruptcy (Rules in Bankruptcy, Nos. 36, 37). Rule 59(b) represents an amalgamation of the provisions of

Equity Rule 69 concerning petitions for rehearing and the statute (U. S. C. A. Title 28, Sec. 391) as to new trials and provides as follows:

> "A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and rehearing and on a showing of due diligence."

We are not concerned with the exception provided in the rule quoted as there is no possible basis for the application thereof in this case.

The 10-day limitation of the above rule represents the "yardstick" Petitioner was obliged to follow and he failed to do so—by almost two months. Accordingly, the statutory period was not extended by his tardy move for a rehearing.

Soberanes De Cambuston v. *U. S.*, 95 U. S. 285, 24 L. Ed. 448.

Marden v. *Campbell Printing Press etc. Co.*, 61 Fed. 607 (C. C. A. 1st).

Conclusion.

It is respectfully submitted that Petitioner has demonstrated no ground for the granting of the Writ of Certiorari and that his petition should be denied.

Respectfully submitted,

ARTHUR S. LYTTON,
OLAF A. OLSON,
Chicago, Illinois,
VIRGIL D. PARISH,
Cincinnati, Ohio,
Attorneys for Respondent.

ROSCOE D. WHEAT,
Portland, Indiana,
Of Counsel.